Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(C)(A)-301–08 OF 2017
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND MARY LIM JJCA
27 NOVEMBER 2018

Arbitration — Award — Application to set aside — Appeal — Appellant and respondent entered into construction contract — Appellant suspended works — Respondent terminated contract — Dispute referred to arbitration — Questions of law — Whether respondent could retain performance bond amount, refuse to compensate appellant for work done and/or make payment for loss of profit — Whether arbitrator may impose liquidated damages on appellant when no such claim was made by respondent and when no certificate of non-completion was issued — Measure of damages — Arbitration Act 2005 s 42

The appellant and the respondent had entered into a contract dated 16 November 2007 ('the contract') for the construction of an expressway ('the works'). On 28 October 2009, the appellant had suspended works which it claimed was justified and on reasonable cause amongst which was its expectation that when both parties entered into the contract, it was on the basis that all the prices of materials would be adjusted if it was found that that there was a need to make adjustment. In response, the respondent issued a notice of default followed by a determination notice dated 11 May 2010. The dispute was referred to the arbitration and the arbitrator found that the suspension of works per se before completion was not a default in the context of cl 51(a)(i) of the conditions of contract ('COC'). The arbitrator held that the respondent had wrongfully terminated the contract and as such the termination was bad in law. Nevertheless, the arbitrator dismissed both the appellant's claim and the respondent's counterclaim. No damages were awarded to the appellant for the wrongful termination, but the arbitrator allowed the respondent to retain the sums agreed under the performance bond and concluded that the respondent's utilisation of the performance bond was not unlawful. Aggrieved by the arbitration award, the appellant filed an application in the High Court to set aside part of the award under s 42 of the Arbitration Act 2005 ('the Act'). The learned judge found that there were no questions of law that require the court's intervention under s 42 of the Act, as such, the learned judge dismissed the appellant's application. In the present appeal, the questions of law raised by the appellant for the court's determination were: (a) whether as a matter of law given that the termination was wrongful, could the respondent retain the performance bond amount, refuse to compensate the appellant for the work done and/or make payment for loss of profit ('question 1'); (b) whether as a

matter of law the arbitrator may impose liquidated damages on the appellant when no such claim was made by the respondent and when no certificate of non-completion ('CNC') was issued ('question 2'); and (c) as a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 by the respondent ('question 3').

Held, allowing the appeal, setting aside the order of the High Court and varying the final award to the extent that allowing the appellant's claim for payment of performance bond with interest at 5%pa from the date of the award until realisation:

(1) The court accepted that the issue of damages or rather what was the appropriate measure of damages was an issue of fact which belonged to the domain of the arbitrator and hence, the court ought not to revisit nor disturb the findings of the arbitrator (see para 43).

(2) As a matter of law, the arbitrator was not entitled to reach the conclusions that he did. The lawfulness of the utilisation of the performance bond depended on the terms of the COC, how the parties had raised the issue and what the responses were. It was not open to the arbitrator to dwell into areas or consider any other provisions of the COC which were not relied on, pleaded or counterclaimed (see para 51).

(3) In attempting to do justice and adjudging that the losses should lie where they fell, the arbitrator however, failed to have regard to the fact that the respondent had called and utilised the performance bond for its 'additional costs' in completion. Such costs were actually the losses that were supposed to lie where they fell. In other words, the respondent was to bear those costs itself. While the respondent's right to cash in on the performance bond was said to be related to the losses apparently suffered by the respondent, and not related to the termination, the encashment of the performance bond after the termination together with the pleas and submissions taken by the respondent indicated quite categorically, that the performance bound was utilised to cover the respondent's losses. Under such circumstances, the law did not countenance a result and conclusion that was reached by the arbitrator (see para 55).

(4) There was no legal basis for the arbitrator to consider and justify the utilisation of the performance bond by reference to the imposition of liquidated and ascertained damages ('LAD'). There was no plea or counterclaim to this effect; and in any event, the conditions for such an imposition were not met. No CNC was issued and more importantly, the date of completion had yet to lapse when the contract was determined (see para 56).

(5) Based on the above findings, the court held that questions 1 and 2 were question of law arising out of the award ie whether, in dismissing the

respondent's counterclaim, the arbitrator erred in law in holding that the respondent could retain and recover the amount of the performance bond for losses suffered by the respondent using the agreed provisions of the LAD, which was not pleaded. The conclusion of the learned arbitrator on the utilisation of the performance bond fell under paras (b), (d) and (e) of the tests set out in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 (see para 57).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki kontrak bertarikh 16 November 2007 ('kontrak tersebut') untuk pembinaan lebuh raya ('kerja tersebut'). Pada 28 Oktober 2009, perayu telah menangguhkan kerja tersebut yang mana ia mendakwa adalah wajar dan atas sebab munasabah kerana ia adalah jangkaannya bahawa apabila kedua-dua pihak memasuki kontrak tersebut, ia adalah berasaskan yang mana harga-harga bahan akan diselaraskan jika didapati terdapat keperluan untuk membuat pelarasan. Sebagai maklum balas, responden mengeluarkan notis ingkat diikuti dengan notis penentuan bertarikh 11 Mei 2010. Pertikaian tersebut telah dirujuk kepada timbang tara dan penimbang tara mendapati pengangguhan kerja tersebut per se sebelum siap bukan suatu keingkaran dalam konteks fasal 51(a)(i) syarat-syarat kontrak ('SSK'). Penimbang tara memutuskan bahawa responden tealh menamatkan secara salah kontrak tersebut dan oleh itu penamatan adalah salah di sisi undang-undang. Walau apa pun, penimbang tara telah menolak kedua-dua tuntutan perayu dan tuntutan balas responden. Tiada ganti rugi diawardkan kepada perayu kerana penamatan yang salah tetapi penimbang tara telah membenarkan responden menyimpan jumlah yang dipersetuju di bawah bon pelaksanaan dan membuat kesimpulan bahawa penggunaan bon pelaksanaan responden tidak menyalahi undang-undang. Terkilan dengan award timbang tara, perayu telah memfailkan permohonan di Mahkamah Tinggi untuk mengetepikan sebahagian award itu di bawah s 42 Akta Timbangtara 2005 ('Akta tersebut'). Haim yang bijaksana mendapati bahawa tiada persoalan undang-undang yang memerlukan campur tangan mahkamah di bawah s 42 Akta tersebut, oleh itu, hakim yang bijaksana telah menolak permohonan perayu. Dalam rayuan ini, persoalan undang-undang yang ditimbulkan oleh perayu untuk ditentukan oleh mahkamah adalah: (a) sama ada sebagai perkara undang-undang memandangkan penamatan itu salah, bolehkah responden mengekalkan jumlah bon pelaksanaan, enggan membayar pampasan kepada perayu untuk kerja tersebut yang telah dilakukan dan/atau membuat bayaran untuk kehilangan keuntungan ('persoalan 1'); (b) sama ada sebagai perkara undang-undang penimbang tara boleh mengenakan ganti rugi jumlah tertentu ke atas perayu apabila tiada tuntutan dibuat oleh responden dan apabila tiada sijil tidak lengkap ('STL') dikeluarkan ('persoalan 2'); dan (c) sebagai perkara undang-undang, apa yang harus menjadi ukuran ganti rugi akibat penamatan perjanjian yang bertarikh 16 November 2007 oleh responden ('persoalan 3').

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan mengubah award akhir setakat membenarkan tuntutan perayu untuk ayaran bon pelaksanaan dengan faedah pada 5% setiap tahun dari tarikh award sehingga selesai:

(1) Mahkamah menerima bahawa isu ganti rugi ataupun lebih tepat apakah ukuran ganti rugi yang sesuai adalah isu fakta yang dalam domain penimbang tara dan justeru, mahkamah seharusnya tidak melihat semula atau mengganggu dapatan penimbang tara (lihat perenggan 43).

(2) Sebagai perkara undang-undang, penimbang tara itu tidak berhak membuat kesimpulan yang dibuatnya. Kesesuaian penggunaan bon pelaksanaan bergantung kepada syarat-syarat SSK, bagaimana pihak-pihak telah menimbulkan isu dan apa jawapannya. Ia tidak terbuka kepada penimbang tara untuk mempertimbangkan apa-apa peruntukan lain SSK yang tidak digunakan, dipli atau dituntut balas (lihat perenggan 51).

(3) Dalam usaha untuk melakukan keadilan dan memutuskan bahawa kerugian harus terletak dalam skopnya, penimbang tara bagaimanapun, gagal mengambil kira fakta bahawa responden telah memanggil dan menggunakan bon pelaksanaan untuk 'kos tambahan' yang siap. Kos tersebut sebenarnya adalah kerugian yang sepatutnya terletak dalam skopnya. Dalam erti kata lain, responden adalah menanggung kos itu sendiri. Walaupun hak responden untuk mendapatkan bon pelaksanaan dikatakan berkaitan dengan kerugian yang nampaknya dialaminya oleh responden, dan tidak berkaitan dengan penamatan, penutupan bon pelaksanaan selepas penamatan bersama dengan pli dan hujah yang dibuat oleh responden menunjukkan agak ketara, bahawa pelaksanaan yang terikat telah digunakan untuk menampung kerugian responden. Dalam keadaan sedemikian, undang-undang tidak melihat hasil dan kesimpulan yang dicapai oleh penimbang tara (lihat perenggan 55).

(4) Tiada asas undang-undang bagi penimbang tara untuk mempertimbangkan dan mewajarkan penggunaan bon pelaksanaan dengan merujuk kepada pengenaan ganti rugi jumlah tertentu dan ditentukan ('LAD'). Tiada pengakuan atau tuntutan balas terhadap kesan ini; dan dalam apa jua keadaan, syarat untuk pengenaan itu tidak dipenuhi. Tiada STL dikeluarkan dan yang lebih penting, tarikh siap belum luput lagi apabila kontrak tersebut ditentukan (lihat perenggan 56).

(5) Berdasarkan dapatan di atas, mahkamah berpendapat bahawa soalan 1 dan 2 adalah persoalan undang-undang yang timbul daripada award tersebut iaitu sama ada, dalam menolak tuntutan balas responden, penimbang tara terkhilaf di sisi undang-undang kerana memutuskan bahawa responden boleh mengekalkan dan medapat balik jumlah bon

pelaksanaan bagi kerugian yang dialami oleh responden menggunakan peruntukan yang dipersetujui LAD, yang tidak dikemukakan. Kesimpulan penibang tara yang bijaksana tentang penggunaan bon pelaksanaan terjatuh di bawah perenggan (b), (d) dan (e) ujian yang dinyatakan dalam kes *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang dan lain-lain rayuan* [2018] 1 MLJ 1 (lihat perenggan 57).]

Notes

For cases on application to set aside award, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1902–1904.

Cases referred to

Chain Cycle Sdn Bhd v Kerajaan Malaysia [2016] 1 MLJ 681, CA (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)
Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak) [2005] 2 MLJ 442; [2004] 3 CLJ 489, CA (refd)

Legislation referred to

Arbitration Act 2005 s 42
Contracts Act 1950 s 54

Appeal from: Originating Summons No WA-24C(ARB)-23–08 of 2016 (High Court, Kuala Lumpur)

Sanjay Mohan (K Gobinath and Adam Lee with him) (Mohanadass Partnership) for the appellant.
Nadia Hanim Mohd Tajuddin (Rafidah Che Aziz with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant/plaintiff against the decision of the High Court in dismissing its application under s 42 of the Arbitration Act 2005 ('the AA 2005').

THE BACKGROUND FACTS

[2] The appellant ('the plaintiff') and the respondent ('the defendant') had entered into a contract dated 16 November 2007 for the construction of an expressway of 'Projek Lebuhraya Pantai Timur Fasa 2, Terengganu Pakej 3: Dari CH 26,100 (Ladang Ketengah Perwira) ke CH 40,038 (Stesyen

Penyelidikan MARDI) Daerah Kemaman, Terengganu Darul Iman ('the works') for a consideration of RM169,232,896.95.

[3] The plaintiff was to complete the works within 130 weeks commencing from 16 June 2007–1 December 2009.

[4] Clause 53 of the conditions of contract ('COC') allows for the fluctuation of prices for five materials ie cement; steel; automative gas oil (diesoline); fuel oil (light and medium) and bitumen.

[5] Due to the increase in the price of construction materials, the defendant, by Treasury Circular No 3/2008 ('the treasury circular'), allowed variation to six more items, namely: (a) premix asphaltic concrete and premix bituminous macadam; (b) sand; (c) aggregates and crushed aggregates; (d) water pipe and sewerage pipe; (e) corrugated steel beam guardrail; and (f) high yield steel fabric.

[6] The treasury circular also allowed contractors to apply for extension of time for not more than three months and the option for mutual termination.

[7] The plaintiff and the defendant had entered into a supplementary agreement on 1 November 2008 to include the six items under the treasury circular.

[8] The contract period was extended twice. The new completion date after the second extension was 11 March 2011.

[9] On 28 October 2009, the plaintiff suspended works. The plaintiff contended that its suspension was justified and on reasonable cause(s) amongst which was its expectation that when the plaintiff entered into the contract with the defendant, it was on the basis that all the prices of materials would be adjusted if it is found that there is a need to make the adjustment.

[10] The defendant issued a notice of default dated 12 February 2010 followed by a determination notice dated 11 May 2010. The determination by the defendant of the plaintiff's employment was purportedly under cl 51(a)(i) of the COC which provides that if the contractor 'without reasonable cause suspends the carrying out of the whole or any part of the works before completion' a default notice can be given followed by a notice determining the employment of the contractor. Thereafter, the defendant made a demand on the full amount of the performance bond of RM7,225,591.55. The bond was encashed on 4 December 2012.

[11] The defendant's position was that because of the plaintiff's continuing default, the contract was validly determined. The plaintiff, on the other hand took the position that the suspension of works was with reasonable basis and that the determination was unlawful.

[12] The dispute between the parties was referred to arbitration. By para 49 of the re-amended points of claim, the plaintiff claimed against the defendant for inter alia cost overrun and loss incurred due to the price increase; for work done by the plaintiff but not paid by the defendant; for loss of profit; for loss of business opportunity; and for payment of performance bond. The defendant counterclaimed for, inter alia, the new completion cost of the works and the adjustment of the original contract sum.

[13] The learned arbitrator, on the concession of the plaintiff that because it had exhausted all its resources including all of its capital reserves due to the extraordinary cost increase, found that the plaintiff had ceased all work by end of October 2009. However, the learned arbitrator also found that the defendant had wrongfully terminated the contract and as such the termination was bad in law. The arbitrator found that suspension of the works per se before completion is not a default in the context of cl 51(a)(i) and since the default notice omitted to state specifically that the default was the 'suspension without reasonable cause', the default notice issued by the defendant was invalid and that the purported consequent determination of the plaintiff's employment was also invalid.

[14] Nonetheless, the arbitrator dismissed both the plaintiff's claim and the defendant's counterclaim. No damages was awarded to the plaintiff for the wrongful termination but the arbitrator allowed the defendant to retain the sums guaranteed under the performance bond.

[15] Dissatisfied with the arbitration award, the plaintiff filed an application in the High Court to set aside part of the award under s 42 of the AA 2005.

THE SECTION 42 APPLICATION

[16] Vide the s 42 application, the plaintiff referred the following questions for determination of the High Court:

> (i) whether as a matter of law given that the termination was wrongful can the defendant retain the performance bond amount, refuse to compensate the plaintiff for work done and/or make payment for loss of profit?

(ii) whether as a matter of law the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no certificate of non-completion ('CNC') was issued?

(iii) as a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 by the defendant?

(iv) whether the defendant is liable to compensate the plaintiff pursuant to s 54 of the Contracts Act 1950 for losses sustained by the plaintiff due to difficulties and hardship in the performance caused by the acts or circumstances created by the defendant?

(v) whether, in law, the defendant is liable to compensate the plaintiff for cost escalation resulting from or due to statutory and/or regulatory implementation or government announcements that were not foreseeable by the plaintiff at the date of the tender?

(vi) whether the doctrine of sanctity of contract is so rigid to the extent that implied terms can no longer be invoked even in a situation where the term is obviously necessary to achieve the intention of the contract or when the terms were necessary to give business efficacy to the transaction or objective of the contract?

(vii) whether as a matter of law the arbitrator can reject the application of implied terms to a contract?

(viii) whether as a matter of law can an arbitrator decide an issue by making reference to laws of foreign jurisdiction such as 'French laws that was adopted by the European courts'?

(ix) whether it is proper as a matter of law for an arbitrator to reach a conclusion based on assumptions?

(x) whether the basis applied by the arbitrator is an acceptable method of assessing the measure of damages?

(xi) whether as a matter of law the plaintiff is entitled to rely on either the doctrine of estoppel and/or legitimate expectation as a result of the conduct and representation made by the defendant?

(xii) whether as a matter of law, a sole arbitrator is entitled to consider and take into account facts favourable to one party and ignore facts favouring the opposing party? and

(xiii) whether in a reasoned award the arbitrator may decide part of the issues and/or claims without fully addressing and assigning reasons therefor?

FINDINGS OF THE HIGH COURT

[17] On question (i) in respect of the performance bond, the learned judge relied on *Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak)* [2005] 2 MLJ 442; [2004] 3 CLJ 489 to hold that even though the arbitrator found the termination not lawful, it does not mean that the plaintiff was entitled to the performance bond or the proceeds thereof. The plaintiff, according to the learned judge, must establish how it is entitled to the proceeds of the performance bond which the plaintiff has failed to do.

[18] The arbitrator considered cl 37 of the contract on performance bond and found that the utilisation of the performance bond is not tied to the determination of the plaintiff's employment. The arbitrator further found that the plaintiff had abandoned works in late October 2009 and that the amount due for liquidated and ascertained damages ('LAD') alone is significantly more than the amount of the performance bond.

[19] The learned judge opined that since the arbitrator has given his reasons as to why the utilisation of the performance bond is not wrongful, his findings should not be disturbed. The learned judge also considered that the plaintiff had challenged the defendant's call on the performance bond and that the plaintiff's claim in that regard had been dismissed by the court.

[20] As such, the learned judge found that there was no error of law in the interpretation and findings of the arbitrator.

[21] On damages, the plaintiff's claim was premised on the defendant's alleged breaches of contract, inter alia, in not extending the fluctuation of price clause to all essential materials and/or in not increasing the contract price and/or that the determination of the plaintiff's employment was mala fide and was consequent to a conspiracy by the defendant and/or its servants and agents.

[22] The learned judge found that the arbitrator had made a finding that the plaintiff has failed to establish the said breaches of the contract upon which the claim for damages are based upon. The arbitrator also made a finding of fact that the losses alleged to be suffered by the plaintiff perhaps could be because the plaintiff had under-tendered and/or failed to allow for the possibility of fluctuation of the price of essential materials and that on the evidence, there was nothing to attribute the plaintiff's losses to any acts or omission of the defendant.

[23] In relation to question (ii), the plaintiff contended that in arriving at his conclusion that the demand on the performance bond was not linked to the termination of the contract but to the delay of the progress of the works, the

arbitrator was of the view that the defendant would be entitled to impose LAD. The plaintiff contended that the defendant's entitlement to the LAD was not a pleaded issue.

[24] In this respect, the learned judge found that question (ii) is misleading as the arbitrator did not impose any LAD on the plaintiff. Her Ladyship agreed with learned senior federal counsel for the defendant that a reference to LAD in determining the utilisation of the performance bond does not mean that the arbitrator had imposed LAD on the plaintiff, but had merely provided a comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. The learned judge therefore held that question (ii) does not arise from the award.

[25] As for question (iii) on whether the plaintiff was entitled to damages as a result of the wrongful termination of the contract by the defendant, the learned judge agreed with the defendant that what is the appropriate measure of damages is a finding of fact made by the arbitrator and not a question of law.

[26] Questions (iv) and (v) were in relation to the plaintiff's contention that its suspension of works was for reasonable causes namely:

(a) the defendant's failure to extend the fluctuation of price clause to all materials;

(b) the legitimate expectation that the fluctuation of price clause would be extended to all materials; and

(c) the legitimate expectation that the contract price would be increased.

[27] The learned judge found that the arbitrator had considered all these contentions and ruled that there was no evidence to support the plaintiff's contentions. These being findings of fact, the learned judge declined to disturb.

[28] In respect of questions (vi), (vii) and (viii) which were premised on implied terms of the contract, the learned judge found that as the plaintiff did not submit on these questions, they are deemed to have been abandoned. In any event, the learned judge found that the issues in the above questions have been dealt with by the arbitrator whereby he found that although the defendant had the power to extend the fluctuation of price clause to other materials, there was nothing, express or implied that supports the plaintiff's contention that the defendant was obliged to do so. The learned judge found that the plaintiff has failed to show in what manner the learned arbitrator had made an error in the application of the law on implied terms.

[29] On questions (ix) and (x), the learned judge found that they are not

questions of law but are findings of fact.

[30] Question (xi) was on doctrine of estoppel and/or legitimate expectation. The arbitrator found that there was no basis for the plaintiff to contend that it was led to believe that it had a legitimate expectation that the contract price will be increased. This finding, according to the learned judge, was made upon careful scrutiny of the alleged meetings and letters relied by the plaintiff and other relevant exchange of communications, the numerous minutes of site meetings, and the contents of the letters and memoranda in respect of delays. These are findings of fact which the court cannot disturb and with these findings, the learned judge held that there was no basis to invoke the doctrine of estoppel and/or legitimate expectation.

[31] The plaintiff did not submit on question (xii) and in any event the learned judge found that the arbitrator had decided the issues raised with solid legal reasoning.

[32] On question (xiii), the learned judge found that the plaintiff's complaint was primarily based on a finding of fact by the arbitrator.

[33] Having found that there were no questions of law that require the court's intervention under s 42 of the AA 2005, the learned judge dismissed the plaintiff's application.

[34] Aggrieved, the plaintiff filed an appeal to this court. We heard the appeal and had unanimously allowed it. Our reasons now follow.

THE APPEAL

[35] Before us, the plaintiff confined its appeal to the following questions of law:

(1) whether as a matter of law given that the termination was wrongful can the defendant retain the performance bond amount, refuse to compensate the plaintiff for the work done and/or make payment for loss of profit?

(2) whether as a matter of law the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no CNC was issued? and

(3) as a matter of law, what should be the measure of damages as a result of the wrongful termination of the agreement dated 16 November 2007 by the defendant?

[36] In *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693, the Federal Court at p 753 stated that one of the following (which was not an exhaustive list), would meet the paradigm of 'any question of law' in s 42:

(a) a question of law in relation to matters falling within (2) of Mustil J's three-stage test (in *The Chrysalis* [1983] 2 All ER 658);

(b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*):

(c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*); error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal had given another (*MRI Trading*);

(e) a question of law as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v Southam*);

(g) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s 37 of the AA 2005; and

(i) a question of construction of a document (*Intelek*).

[37] It was submitted for the plaintiff that the questions of law posed meet the threshold requirements of s 42 of the AA 2005 as enunciated by the Federal Court.

[38] Question 1 relates to whether as a matter of law, the arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant and when no CNC was issued. It was submitted for the plaintiff that the arbitrator had incorrectly concluded that as the amount of LAD suffered by the defendant is well over the amount of the performance bond, the utilisation of the performance bond which is not tied to termination, was not wrongful.

[39] On question 2, the plaintiff essentially argued that as a matter of law, the defendant cannot profit from its own breach. It therefore must follow that the defendant having unlawfully terminated the contract which resulted in the dismissal of its counterclaim, must compensate the plaintiff for the work carried out and must return the performance bond.

[40] On question 3, it was contended for the plaintiff that given the fact that the defendant had wrongfully terminated the contract, this must mean as a

matter of law but for the wrongful termination the plaintiff would have been able to carry out and complete the works. Therefore the finding of the arbitrator that the appellant is not entitled to its claim is incorrect.

[41] The plaintiff in this case had submitted the necessary claims to the defendant premised on works carried out prior to the wrongful termination of the contract by the defendant. It was submitted that the plaintiff was entitled to be paid for the work which it had carried out. And that as a result of the wrongful termination which resulted in the dismissal of the defendant's counterclaim, the plaintiff is entitled to recover the value of work carried out, the costs incurred and the return of the value of the performance bond.

[42] In response, learned senior federal counsel submitted that the plaintiff's claim centered on fluctuation of price and that damages are findings of fact which do not fall under s 42 of the AA 2005. There was no error by the learned judge and that this court should not disturb the findings of fact by the arbitrator.

OUR DECISION

[43] Whilst we accept that the issue of damages or rather what is the appropriate measure of damages is an issue of fact which belongs to the domain of the arbitrator and hence we ought not to revisit nor disturb the findings of the arbitrator (see *Far East Holdings Bhd*; *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681), we were unanimous in our decision that questions 1 and 2 are questions of law within s 42 of the AA 2005.

[44] Questions 1 and 2 were actually questions in relation to the performance bond. Question 1 raised the issue whether as a matter of law, the defendant was entitled to retain the proceeds of the performance bond given that its counterclaim was dismissed by the arbitrator. Question 2 was in relation to whether, as a matter of law, the proceeds of the performance bond could be retained by the defendant as the amounts due to the respondent 'using the agreed provisions for the calculation of the LAD' when the defendant's entitlement to the LAD was not a pleaded issue.

[45] The arbitrator considered the issue of utilisation of the performance bond in the following manner:

> 49.1 Clause 37 of the Contract is in respect of the Performance Bond to be provided by the Contractor.
>
> The relevant portion of Clause 37 (c) of the Conditions of Contract is as follows:
>
> > If a Contractor fails to execute the Contract or commits any breach under the Contract, the Government or S.O. ... may utilize and make payments out of ...

A the said Performance Bond ... in accordance with the terms of the Contract.

49.2 It is particularly to be noted that the utilization of the Performance Bond is not tied to the termination of the employment of the Contract. Clause 40 of the Conditions of Contract provides that if the Contractor fails to complete the Works by the date of completion, the Contractor shall pay the Liquidated and Ascertained Damages (LAD) for the period during which the Works have remained incomplete and the S.O. may certify the amount of LAD due to the Respondent.

49.3 As has been seen, it is my finding that the Claimant Contractor had, well before completion, abandoned the Works in or about October 2009, and certainly had done so by the 12 of February 2010. The evidence of RW6, Abdul Kadir bin Abdul Samad is that at the relevant period he was the S.O's representative for the project. In due course he issued revision 2 of the Final Certificate in respect of the Contract, full particulars of which are given in his Witness Statement. If, in fact the Claimant had abandoned the Works and I have found that it did abandon the Works in late October 2009, when only some 33% of the Works had been completed, there is no question but that, using the agreed provisions for calculation of the Liquidated and Ascertained Damages which is provided in the Appendix to the Conditions of Contract, the amounts due to the Respondent as LAD alone, is significantly more than the amount of the Performance Bond.

...

49.6 As clearly the amount of LAD suffered by the Respondent is well over the amount of the Performance Bond, and although in the face of my finding at paragraph 66.11 hereof that the termination was not properly effected and not valid and because of which the Respondent is not entitled to claim Damages, the utilization of the Performance Bond which is not tied to termination, was not wrongful.

[46] The learned judge held that since the arbitrator had considered cll 37 and 40 on the LAD; since the arbitrator had found that the utilisation of the performance bond is not tied to the determination of the plaintiff's employment; and since the amount due for the LAD is significantly more than the amount of the performance bond, the arbitrator was right to rule that the defendant's right to the proceeds of the performance bond is not related to the termination but to the losses suffered by the defendant and/or the amounts due to the defendant arising from the breach or breaches of the contract by the plaintiff. And since the arbitrator had given his reasons as to why the utilisation of the performance bond is not wrongful, the learned judge declined to disturb the arbitrator's findings.

[47] Her Ladyship further held that there was no error of law in the interpretation and findings of the arbitrator on the performance bond, because the plaintiff had earlier on claimed/applied for an injunction to restrain the defendant from calling on the performance bond and the plaintiff's claim had been dismissed by the court.

[48] On question 2, the learned judge agreed with the defendant that the reference to LAD by the arbitrator in determining the utilisation of the performance bond does not mean that the arbitrator had imposed LAD on the plaintiff, but that the arbitrator had merely provided a comparison to show that if the defendant did claim for LAD, the amount due to the defendant will be more than the amount of the performance bond. The learned judge therefore found that question 2 did not arise from the award.

[49] With respect, we disagreed with the learned judge. The arbitrator did not state that he was making such comparison and from our reading of the award, in particular paras 49.2, 49.3 and 49.6 quoted above, the arbitrator had in fact expressly found, pursuant to cl 40 of the COC, using the provisions of the LAD, that there was amount due to the defendant, which amount was more than the amount of the performance bond.

[50] Whether or not the arbitrator had merely referred to the LAD (which was not pleaded and counterclaimed) as comparison for the losses that the defendant may recover from the plaintiff which losses were found to be significantly more than the amount of the performance bond, the pertinent question to ask is whether the arbitrator erred in law in his conclusion on the defendant's entitlement to the performance bond, that the defendant's utilisation of the performance bond 'was not unlawful'.

[51] In our view, as a matter of law, the arbitrator was not entitled to reach the conclusions that he did. The lawfulness of the utilisation of the performance bond depends on the terms of the COC, how the parties have raised the issue and what the responses were. It was not open to the arbitrator to dwell into areas or consider any other provisions of the COC which were not relied on, pleaded or counterclaimed.

[52] In relation to the performance bond, the plaintiff's claim as pleaded in para 46 of the points of claim was that the defendant's termination was wrongful and that the defendant had proceeded to make a demand on the performance bond based on such wrongful termination. In response, the defendant, in para 34 of the points of defence claimed that the contract had been determined on 11 May 2010 due to the plaintiff's complete suspension of works, that it had, inter alia, exercised its rights and obligations under the contract, and that it 'continued to make demand on the performance bond under the provisions of the COC as the Claimant had failed to perform its obligation under the Contract'.

[53] In its submissions, the defendant took the position that under cl 50 of the COC, it was entitled to forfeit the performance bond and use the monies to set off for additional costs incurred in appointing a third party to complete

A the contract. The defendant further submitted that because the performance bond was an unconditional bond, it was entitled to call upon the bond wherever it decides. Since the plaintiff was in breach, the determination was valid; and this in turn meant that the call and utilisation of the performance bond was within its contractual rights.

B

[54] The learned arbitrator had found that the determination was invalid; that 'a condition precedent to claiming the amounts incurred in utilising a completion contractor to complete the uncompleted works, has not been met' (see para 75.2 of the award). Given such a finding which remains unchallenged, C the defendant would not in law, be entitled to claim for its losses, including costs incurred in mitigating its losses. The arbitrator has as much admitted this to be the case (see paras 76.1–76.3 of the award).

D **[55]** In attempting to do justice and adjudging that the losses should lie where they fell, the arbitrator however, failed to have regard to the fact that the defendant had called and utilised the performance bond for its 'additional costs' in completion. Such costs are actually the losses that are supposed to lie where they fell. In other words, the defendant was to bear those costs itself. E While the defendant's right to cash in on the performance bond was said to be related to the losses apparently suffered by the defendant, and not related to the termination, the encashment of the performance bond on 4 December 2012, after the termination on 11 May 2010 together with the pleas and submissions taken by the defendant indicate quite categorically, that the performance F bound was utilised to cover the defendant's losses. Under such circumstances, the law does not countenance a result and conclusion that was reached by the arbitrator.

G **[56]** We also agreed with the plaintiff that there was no legal basis for the arbitrator to consider and justify the utilisation of the performance bond by reference to the imposition of LAD. There was no plea or counterclaim to this effect; and in any event, the conditions for such an imposition were not met. No CNC was issued and more importantly, the date of completion (11 March H 2011) has yet to lapse when the contract was determined on 11 May 2010.

[57] Questions 1 and 2 were thus questions of law arising out of the award ie whether, in dismissing the defendant's counterclaim, the arbitrator erred in law in holding that the defendant could retain and recover the amount of the I performance bond for losses suffered by the defendant using the agreed provisions of the LAD, which was not pleaded. The conclusion of the learned arbitrator on the utilisation of the performance bond falls under paras (b), (d) and (e) of the tests set out in *Far East Holdings*.

CONCLUSION

[58] The arbitrator had dismissed the defendant's counterclaim, yet he held that the defendant was entitled to the performance bond as he found that the amounts due to the defendant as LAD alone is significantly more than the amount of the performance bond. Although the arbitrator found that the performance bond was not tied to the termination of the plaintiff's appointment, in our judgment, there was no basis in law for the arbitrator to find that the defendant was entitled to the amount of the performance bond as losses suffered by the defendant, having dismissed the defendant's counterclaim.

[59] We therefore allowed the appeal with costs and we set aside the order of the High Court. The final award dated 15 July 2016 was varied to the extent that the plaintiff's claim in para 49(g) of the re-amended points of claim for payment of the performance bond was allowed, with interest at 5%pa from the date of the award until realisation.

Order accordingly.

Reported by Dzulqarnain Ab Fatar